SUPREME COURT, U. S.

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No. 151

# In the Supreme Court of the United States

OCTOBER TERM, 1968

EDWARD NASON, PETITIONER

*v.*

IMMIGRATION AND NATURALIZATION SERVICE

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT*

## BRIEF FOR THE UNITED STATES IN OPPOSITION

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### OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A, pp. A1–A9) is not yet reported. A prior opinion of the court of appeals remanding the case to the Immigration Service for application of the proper standard for burden of proof (Pet. App. B, pp. A10–A19) is reported at 370 F. 2d 865.

### JURISDICTION

The judgment of the court of appeals was entered on April 29, 1968. The petition for a writ of certiorari was filed on June 3, 1968. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).



313-813—68

## QUESTIONS PRESENTED

1. Whether statements made by petitioner during an interview with an Immigration Officer were properly admitted into evidence at subsequent deportation proceedings.

2. Whether the evidence was sufficient to support the deportation order.

## STATEMENT

Petitioner, a native and citizen of Canada, was admitted to the United States for permanent residence on April 29, 1961 (Tab 4, pp. 2–3; Tab 6).[1] Following a hearing before a Special Inquiry Officer on August 6, 1965 (Tab 4), petitioner was found deportable under Section 241(a)(4) of the Immigration and Nationality Act (8 U.S.C. 1251(a)(4)) as an alien who had been convicted of two crimes involving moral turpitude not arising out of a single scheme of criminal misconduct (Tab 3). On June 2, 1966, the Board of Immigration Appeals dismissed petitioner's appeal (Tab 1). On petition for review, the court of appeals remanded the case because the Board had not made a "satisfactory application," on the record as a whole, of the "clear, unequivocal, and convincing evidence" standard required by *Woodby* v. *Immigration and Naturalization Service,* 385 U.S. 276 (Pet. App. B; 370 F. 2d 865). The Special Inquiry Officer again held

[1] The administrative record filed with the Clerk of this Court consists of a single volume divided into tabbed sections. Tabs 1–8 are the records of the deportation proceeding and the first administrative review. Tabs R1–R6 are the records of the second administrative review following remand from the court of appeals.

petitioner deportable (Tab R3), and the Board of Immigration Appeals dismissed the appeal (Tab R1). The court of appeals dismissed the petition for review (Pet. App. A).

1. On about November 1, 1962, petitioner rented a Post Office Box at Grand Central Station in New York under the name of "Charles C. Cole." He ordered various items of merchandise for delivery to the Post Office Box and paid for them by worthless checks signed "Charles C. Cole." This activity terminated about December 31, 1962 (Tab 8, pp. 3–4). Nine months later, in early October 1963, petitioner rented another Post Office Box at Grand Central Station using the name "Peter Hughes." As before, he ordered merchandise to be delivered to the Post Office Box and paid for it by worthless checks. Petitioner was apprehended for the "Peter Hughes" fraud in the latter part of October 1963 (Tab 8, pp. 4–5). About a month later, independent police investigation established that petitioner was also the perpetrator of the "Charles Cole" fraud (Tab 8, p. 5).

On April 9, 1965, petitioner pleaded guilty in the United States District Court for the Southern District of New York to six counts of a twelve-count information, charging him with having devised schemes to defraud by use of the mails, in violation of 18 U.S.C. 1341 (Tab 4, pp. 3–4; Tab 7; Tab 8, p. 6). Three of the counts to which petitioner pleaded guilty involved separate mailings during the November–December 1962 period, and the other three counts involved separate mailings in the October 1963

period. He was given a suspended sentence and placed on probation for two years (Tab 4, p. 12).

2. On June 15, 1965, petitioner appeared without counsel before an Immigration officer conducting an investigation of the convictions as related to Immigration Service interests (Tab 8). The officer advised petitioner that (Tab 8, p. 1):

> I desire to take a statement from you concerning a matter of interest to this Service. You are advised that such a statement should be entirely voluntary and that whatever you say may be used against you or any other person in any Service proceedings. Do you understand and are you willing to make that statement at this time?

Petitioner replied that he was willing to make a statement. He admitted that he had pleaded guilty to six counts of mail fraud in the district court and that the facts of the offenses as stated in detail in the information were true (Tab 8, pp. 2–5). The Immigration officer asked a number of questions designed to determine whether the apparently separate fraudulent schemes charged in the information were, in fact, separate courses of criminal conduct. Petitioner's answers showed that he had not engaged in any similar criminal activities between the two incidents of fraudulent conduct for which he was convicted and that he did not connect the "Charles Cole" fraud and the "Peter Hughes" fraud in his own mind as a single scheme or course of criminal conduct (Tab 8, pp. 4–6).

At the deportation hearing before the Special Inquiry Officer, at which he was represented by counsel, petitioner testified that he intended from the beginning to continue his fraudulent activity over a "fair amount of time" using several different names and several fictitious accounts (Tab 4, pp. 7–10, 14–15, 19–20). He denied, however, that he contemplated pursuing the crime for a given time and "then perhaps, so to speak, take a rest and then come back and perform these criminal acts at another time" (Tab 4, pp. 9–10).

## ARGUMENT

1. In its earlier opinion (Pet. App. B, pp. A14–A16), the court below properly rejected petitioner's contention that the failure of the Immigration officer to inform him that he could have counsel present during an investigatory interview violated his Fifth Amendment right against self-incrimination. Petitioner was plainly told that any statement which he might make was to be entirely voluntary and that it could be used against him in any subsequent Service proceedings.

There is nothing in this Court's opinion in *Miranda* v. *Arizona*, 384 U.S. 436, to suggest that the guidelines there announced are applicable in a civil deportation proceeding. Furthermore, the hearing in this case was held on August 6, 1965, before the decision of this Court in *Miranda*. See *Johnson* v. *New Jersey*, 384

U.S. 719.[2] Even assuming *arguendo* that the principles of *Miranda* or *Escobedo* v. *Illinois*, 378 U.S. 478, were applicable, the facts of this case disclose no violation. Petitioner was not in custody when he voluntarily came to the office of the Service for an interview. He was not prevented from consulting counsel nor did he request the assistance of counsel. This Court recently declined review of a factually similar case. *Ah Chiu Pang* v. *Immigration and Naturalization Service*, 368 F. 2d 637 (C.A. 3), certiorari denied, 386 U.S. 1037. There is no reason for further review here.

2. Section 241(a)(4) of the Act (8 U.S.C. 1251(a)(4)) makes deportable any alien "who at any time after entry is convicted of two crimes involving moral turpitude, not arising out of a single scheme of criminal misconduct * * *." Petitioner does not question that he was convicted of two crimes involving moral turpitude. He urges only that there was no substantial

[2] As noted in the government brief in opposition in *Ah Chiu Pang* v. *Immigration and Naturalization Service*, 368 F. 2d 637 (C.A. 3), certiorari denied, 386 U.S. 1037 (No. 1081 Misc., p. 2, n. 2, O.T. 1966), instructions of the Immigration and Naturalization Service to investigators now provide that, in situations such as this, where an alien is formally interviewed preliminary to possible deportation proceedings, he will be given the following advice: "You have the right to remain silent. Anything you say can be used against you, or any other person, in Immigration and Naturalization Service proceedings. You have the right, at no expense to the Government, to seek the advice of a lawyer of your choice before answering any questions, and to have him with you during questioning. If you decide to answer questions now without a lawyer present, you will still have the right to stop answering at any time. You also have the right to stop answering at any time until you talk to a lawyer." See 1 Gordon and Rosenfield, *Immigration Law and Procedure*, § 5.2b (1967 Supp.)

evidence to show that the two crimes did not arise out of a single scheme of criminal misconduct. The court of appeals correctly decided otherwise. Petitioner concedes that there was a nine-month period, without similar criminal activity, between the December 1962 series of fraudulent mail orders under the name of Cole and the October 1963 series under the name of Hughes (Pet. 13). During the preliminary investigation by the Service, petitioner made it clear that he did not connect the two ventures in his own mind, except that the latter occasion was a previously uncontemplated repetition of a tested method of defrauding merchants. Petitioner's testimony at the deportation hearing that he had a general intention from the start of repeating the crime at intervals, using other fictitious names, does not alter the obvious separate nature of the crimes here. Indeed, he specifically denied that, at the time he formed his original intention, he envisioned pursuing the crime, ceasing his activities, and then resuming his mail fraud operation under another name (Tab 4, pp. 9–10). The crimes did not arise out of a single scheme of criminal misconduct within the meaning of the immigration statute. See *Costello* v. *Immigration and Naturalization Service*, 311 F. 2d 343, 347–348 (C.A. 2), reversed on other grounds, 376 U.S. 120.[3]

[3] The petition for a writ of certiorari in *Costello* raised the question whether successive filing of fraudulent income tax returns was a single scheme of criminal misconduct (No. 83, pp. 2–3, 12–23, O.T. 1963). This Court nevertheless limited the grant to an unrelated problem (372 U.S. 975).

## CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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